Supreme Court, U.S.
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No. 98-512

In the Supreme Court of the United States

October Term, 1998

Anita Davis, *et al., Petitioners,*

v.

Lawton Chiles, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

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The respondents agree with petitioners that it would be improper, and contrary to this Court's decision in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), for a court of appeals to hold that a State's interest in preserving its existing judicial election system always outweighs evidence of vote dilution. According to respondents, however, the Eleventh Circuit did not "so hold[] ... [in] the case at bar," Op. Cert. 17, but instead simply expressed a "concern" that it so held. Op. Cert. 9, 10, 11. To sustain this curious argument, the respondents defend for the most part, not the decision of the Eleventh Circuit, but a decision in another case by the Seventh Circuit, *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir 1997). According to the respondents, certiorari should be denied in the present case because the Seventh Circuit does not accord a State's interest dispositive weight as a matter of law, but instead would allow a State's interest to be overcome by evidence of "gross racial vote dilution." Op. Cert. 9-10, quoting *Milwaukee Branch*, 116 F.3d at 1200.

Of course, the petition here seeks review of a decision of the Eleventh Circuit, not the Seventh Circuit. And the Eleventh Circuit in this case said that the State's interest constitutes "an insurmountable weight" to plaintiffs challenging at-large judicial election districts, J.S. App. 21a. "In this Circuit," said the Court of Appeals in this case, "Section Two of the Voting Rights Act cannot be said to apply, in any meaningful way, to at-large judicial elections." *Id.* It is this conclusion that led the Eleventh Circuit to reject the petitioners' appeal even though the petitioners had, according to the Eleventh Circuit, "presented persuasive evidence of racially polarized voting

in elections for judgeships in the Second Circuit and Leon County Courts." J.S. App. 28a.

In ruling against the petitioners, the Eleventh Circuit never suggested that plaintiffs in judicial elections cases under Section 2 could overcome the State's interest with "substantial proof of racial dilution," *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 870 (5th Cir. 1993) ("*LULAC*"), or with a showing of "gross racial vote dilution," *Milwaukee Branch*, 116 F.3d at 1200. Instead, it held that the State's interest is an "insurmountable weight," J.S. App. 21a, such that no showing of dilution, however strong, can overcome that interest.

While the respondents argue that petitioners did not meet the Seventh Circuit's "gross racial vote dilution" standard, the Eleventh Circuit did not even mention that standard, much less hold that the petitioners failed to meet it.

Indeed, in contrast to the Seventh Circuit's conclusion in *Milwaukee Branch* that the evidence there "show[ed] not only substantial willingness among white voters to support black candidates, but also the ability of those candidates to gain and keep office," 116 F.3d at 1197, the Eleventh Circuit said here that "[n]otwithstanding this political cohesion among black voters, however, white voters did not supply enough crossover votes for the black candidates to prevail, but instead provided overwhelming support to the white candidates." J.S. App. 4a.

Because of its absolute approach regarding the State's interest, the Eleventh Circuit never weighed this evidence of dilution against the State's interest, and never considered any of it as part of the "totality of

circumstances" inquiry mandated by the language of Section 2.[1] While the respondents frame the first of their restated Questions Presented as "[w]hether the degree of evidence of racial bloc voting in this case ... outweigh[s] Florida's strong interest in maintaining its current system," that question was never addressed by the Eleventh Circuit. Properly stated, the question before this Court is whether the Eleventh Circuit was correct in declining even to consider and weigh the evidence of polarization and dilution.

By focusing on the Seventh Circuit decision in *Milwaukee Branch*, the respondents inadvertently highlight the level of conflict and confusion that exists in the Courts of Appeals over the application of Section 2 to judicial elections. While the Eleventh Circuit has said that the State's interest is an insurmountable weight, the Fifth and Seventh Circuits have held that the interest can be overcome, albeit only by a heightened showing of "substantial proof of racial vote dilution," *LULAC*, 999 F.2d at 868, or "gross racial vote dilution," *Milwaukee Branch*, 116 F.3d at 1200.

Whatever the word "gross" may mean in this context, and whether or not there is any basis in the language or structure of Section 2 to require a heightened showing in

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[1]The respondents make reference to the election and appointment of judges that occurred since the decision of the District Court, Op. Cert. at 2. When the respondents sought to include this post-trial evidence in the record on appeal, the Eleventh Circuit refused to grant their motion. *See*, Appellees' Request for Judicial Notice, filed 2 Jan 1997 and never ruled upon; and Appellees' Petition for Rehearing, filed May 1998, denied 26 June 1998. The refusal was proper because these facts had not been considered by the District Court and would require reopening the record to allow the petitioners to present evidence of the surrounding circumstances.

judicial elections cases, the conflict among the circuits is clear. This Court should grant certiorari to resolve it and to eliminate at least some of the confusion that has arisen in the wake of *Houston Lawyers'* over the proper application of Section 2 to judicial elections.

And, of course, certiorari should be granted because of the Eleventh Circuit's conflict with *Houston Lawyers'* itself. As noted earlier, the respondents agree with petitioners that it would be wrong, and would conflict with *Houston Lawyers'*, for the Eleventh Circuit to place insurmountable weight upon the State's interest. The decision below clearly states an "insurmountable weight" standard. Respondents' efforts to recharcterize the decision cannot remove or alter that standard.

Lastly (and certainly not least), since the "insurmountable weight" standard is inconsistent with this Court's holding in *Houston Lawyers'* that the State's "interest does not automatically, and in every case, outweigh proof of racial vote dilution," 501 U.S. at 427, the decision below conflicts with *Houston Lawyers'*.

The petition should be granted.

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